87-1126

No.

Supreme Court, U.S.
FILED
JUL 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ARCHDIOCESAN SCHOOL OFFICE, ET AL.,
Appellant

vs.

COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES,
Appellee

ON APPEAL FROM THE SUPREME COURT OF CONNECTICUT

JURISDICTIONAL STATEMENT

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July 15, 1987

QUESTIONS PRESENTED

1. Whether the Connecticut Fair Employment Practices Act (Conecticut General Statutes, Section 46a-60 *et seq.*) violates the First Amendment to the United States Constitution insofar as it is applied to a church.

2. Whether the Connecticut Fair Employment Practices Act (Connecticut General Statutes, Section 46a-60 *et seq.*) violates the First Amendment to the United States Constitution insofar as it is applied to a church pursuant to a complaint of religious discrimination.

3. Whether the Connecticut Fair Employment Practices Act (Connecticut General Statutes, Section 46a-60 *et seq.*) violates the First Amendment to the United States Constitution by requiring a church to submit to an intrusive investigation of its hiring practices by a state agency upon a complaint of religious discrimination.

LIST OF PARTIES

An additional defendant below and appellant in this Court is Reverend James G. Fanelli, Superintendent, Archdiocesan School Office.[1]

The plaintiff below and appellee in this Court was acting on behalf of the complainant, Susan J. Hunter.

1. The appellant Archdiocesan School Office is a division of The Hartford Roman Catholic Diocesan Corporation.

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OPINIONS BELOW

The opinion of the trial court, Aspell, J., issued March 7, 1985 (Appendix B, infra, A-9) is reported at 11 Conn. L. Trib. No. 32, p.19 (August 12,1985). The opinion of the Connecticut Supreme Court released March 24, 1987 (Appendix A, infra, A-1) is reported at 202 Conn. 601, 522 A.2d 781 (1987). The order of the Connecticut Supreme Court dated April 16, 1987 (Appendix C, infra, A-17) is not reported.

JURISDICTION

This is an appeal from the final decision of the Connecticut Supreme Court on March 24, 1987, rehearing denied on April 16, 1987, which set aside the judgment of the trial court granting the defendants' "Motion to Dismiss the Plaintiff's Petition for Ordering Answers to Interrogatories" and remanded the case for further proceedings. In doing so, the Connecticut Supreme Court upheld the constitutional validity of the Connecticut Fair Employment Practices Act (Conn. Gen. Stat., Section 46a-60, 46a-88) insofar as it applies to a church and compels a church to submit to extensive investigation by a state agency into the church's hiring practices. The appellants have, from the outset, drawn into question the validity of the Connecticut Fair Employment Practices Act to the extent that it has been applied to a church on the ground of its repugnance to the First Amendment to the United States Constitution.

A notice of appeal was filed with the clerk for the Connecticut Supreme Court on July 15, 1987. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the Constitution of the United States provides as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble and to petition the government for a redress of grievances."

2. Connecticut General Statutes, Secs. 46a-54, 46a-60, 46a-83 and 46a-88 are set forth in relevant part in (Appendix E, infra, A-20).

STATEMENT OF THE CASE

On or about September 6, 1979, a Complaint Affidavit was filed by the relator, Susan J. Hunter, with the appellee, Commission on Human Rights and Opportunities against the appellants, Archdiocesan School Office and Reverend James G. Fanelli, Superintendent, Archdiocesan School Office. (Appendix F, infra, A-28). The Complaint Affidavit alleged that in July, 1979, the relator applied for a teaching position at St. Martin de Porres Parish School in New Haven, Connecticut; that in July and August, 1979, she was interviewed by the pastor and the school principal; and that on August 27, 1979, she was informed that she would not be granted a final interview because she was not Catholic. (Appendix F, infra, A-29). The relator alleged an unlawful denial of employment as a teacher because of her religion (Methodist), in violation of Sec. 46a-60 of the Connecticut General Statutes and Title VII of the Civil Rights Act of 1964.

A copy of the Complaint Affidavit was served on the appellant on or around September 25, 1979. The appellee, a state agency, proceeded to investigate the Complaint Affidavit and propounded interrogatories to the appellants which were not answered. (Appendix F, infra, A-32, 35). Pursuant to Connecticut General Statutes, Sec. 46a-88, the appellee petitioned the trial court for an order compelling the appellants to answer the interrogatories. (Appendix F, infra, A-27). At the direction of the trial court, the appellants filed two separate Motions to Dismiss. The first Motion to Dismiss, filed by the appellants on September 24, 1981, addressed all grounds for dismissal other than the constitutional grounds. Said Motion to Dismiss was denied by the trial court on January 7, 1982 and is of no consequence as regards this appeal. Subsequently, on October 20, 1982, the appellants filed a Motion to Dismiss the petition based on lack of subject matter jurisdiction in that the Connecticut Fair Employment Practices Act constitutionally cannot be applied to a church. (Appendix G, infra, A-39). The appellant argued

that the powers granted to the appellee in the Connecticut Fair Employment Practices Act were subject to the limitations of the free exercise and establishment clauses of the First Amendment to the United States Constitution and that, to the extent that the statute is claimed to apply to churches, it is unconstitutional. On March 4, 1985, the second Motion to Dismiss was granted by the trial court. (Appendix B, infra, A-9). The appellee appealed to the Connecticut Supreme Court. By decision dated March 24, 1987, the Connecticut Supreme Court set aside the judgment of the trial court and remanded the case for further proceedings. (Appendix A, infra, A-1). A Motion to Reargue filed by the appellants on April 3, 1987, was denied by the Connecticut Supreme Court on April 16, 1987. (Appendix C, infra, A-17).

SUBSTANTIALITY OF THE FEDERAL QUESTIONS

The questions presented on this appeal have never been passed upon by this court. The questions involve the free exercise of religion by a church in the hiring of its teachers and whether the state may burden that exercise by requiring the church to submit to an investigation into its hiring practices based upon a complaint of religious discrimination.[2]

Section 46a-54(10) of the Connecticut General Statutes permits the Commission on Human Rights and Opportunities (hereinafter sometimes "CHRO") to file interrogatories in certain situations, that is, as part of the investigation of a valid complaint affidavit. The powers granted to the CHRO are subject to the constitutional limitations of the Free Exercise and Establishment Clauses of the First Amendment to the United States Constitution which clearly bar the CHRO's right to proceed in this matter.

The purpose of both the Establishment Clause and the Free Exercise Clause was to protect religious liberty. *See Wisconson v. Yoder*, 406 U.S. 205 (1972). Religious freedom encompasses the "power [of religious bodies] to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Keddroff v. St. Nicholas Cathedral of Russian Orthodox Church of North America*, 344 U.S. 94 (1952). Constitutional analysis under the Free Exercise Clause, although it overlaps with the analysis of the Establishment Clause,

2. Note that the Connecticut Fair Employment Practices Act does not contain an exemption analogous to Section 702 of Title VII of the federal Civil Rights Act of 1964 exempting religious organizations from Title VII's prohibition of religious discrimination in employment. Section 702 was discussed recently by this court in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Christine J. Amos*, U.S. 55 L.W. 5006 (U.S. June 24, 1987), in which it was held constitutional even as applied to non-profit non-religious activities of religious employers. It is the lack of a similar exemption in the Connecticut statute which renders that statute constitutionally defective.

See *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963) has been given a framework by recent Supreme Court pronouncements.

Free Exercise analysis involves a three-step test as utilized in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). First, it must be determined that a legitimate religious belief is held by the defendant, or that, under the facts of this case, the church school is pervasively religious. Second, inquiry must be made as to whether the free exercise rights of the defendant would be either burdened or inhibited by the exercise of jurisdiction by the CHRO. Third, if an affirmative answer is arrived at by the second inquiry, the government must show that the burdening of rights is justified by a compelling state interest. Church schools are an integral part of the religious mission of the church. "The canons of the Roman Catholic Church provide, in substance, that Roman Catholic children shall be taught nothing contrary to the Catholic faith and good morals and that religious and moral training shall occupy the principal place in the school curriculum." *Snyder v. Newtown*, 147 Conn. 374, 377 (1960), 161 A.2d 770, appeal dismissed *per curiam* 365 U.S. 299 (1961). Justice Douglas has stated that "Everything taught in most parochial schools is taught with the ultimate goal of religious education in mind." *Lemon v. Kurtzman*, 403 U.S. 602, 635 (1971) (Douglas, J., concurring). As quoted therein:

> "It is a commonplace observation that in the parochial school religion permeates the whole curriculum, and is not confined to a single half-hour period of the day. Even arithmetic can be used as an instrument of pious thoughts, as in the case of the teacher who gave this problem to her class: 'If it takes forty thousand priests and a hundred and forty thousand sisters to care for forty million Catholics in the United States, how many more priests and sisters will be needed to convert and care for the hundred million non-Catholics in the United States?'"

Id., 403 U.S. at 634-35, quoting Rev. Joseph H. Fichter, S.J., Parochial School: A Sociological Study 86 (1958). This

court has stated that parish schools "involve substantial religious activity and purpose" since they are a powerful vehicle for transmitting the Catholic faith to the next generation. *Lemon v. Kurtzman*, 403 U.S. at 616. Indeed, court definition of "parochial schools" is that they are the "church itself." *McCormick v. Hirsch*, 460 F.Supp. 1337, 1353 (M.D. Pa. 1978).

The second part of the analysis, the determination of whether the free exercise liberties are either burdened or inhibited, requires the court to determine whether the exercise of jurisdiction by the CHRO could have the effect of interfering with religious beliefs or practices. "[T]he Free Exercise Clause, . . . by its terms, gives special protection to the exercise of religion." *Thomas v. Review Board*, 450 U.S. 707, 713 (1981). This court has held that: "In this country the full and free right to entertain any religious belief, to practice any religious principle, and *to teach any religious doctrine* which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all." *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728-29 (1871) (emphasis added). The hiring of teachers by a church is a means for carrying out this constitutionally-protected right to teach religious doctrine to its young members. Justice Douglas stated that "the presence of teachers is critical to the essential purpose of the parochial school, viz., to advance the religious endeavors of the particular church." *Lemon, supra*, 403 U.S. at 641 (1971). The Fourth Circuit Court of Appeals recognized that "perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its messages, and interpret its doctrines, both to its own membership and to the world at large." *Rayburn v. General Conference of Seventh Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985). Moreover, as it has been noted, "Every teachers' methods and message are necessarily shaped by their own individual views." *Maguire v. Marquette University*, 627 F.Supp. 1499, 1506 (E.D. Wis. 1986). Therefore, it follows that, in order to fully exercise its right to select teachers to teach its values, a church must be

given a meaningful opportunity to inquire into the individual views of its prospective teachers and to determine which individuals' views are most compatible with those of the church.

It is the function of a church, and not the state or its courts, to decide how its goal of propagating its faith to its young members can best be accomplished. Therefore, it is up to the church and not the state or its courts to determine which teachers are best suited to teach the children the tenets and beliefs of the church and to exemplify its moral standards. Because teachers play a pivotal role in the propagation of religious tenets, *any* attempt to limit or supplant the ability of a church to probe into the teacher applicants' religious beliefs or to hire on the basis of religion would result in an impermissible interference by the state in the religious practices of the church, its pupils, and the pupils' parents. *See, e.g., Maguire v. Marquette University*, 627 F.Supp. 1499 (E.D. Wis. 1986) (Court is barred by the First Amendment from involving itself in the procedures and hiring practices of the theology department of a Jesuit University); *Larsen v. Kirkham*, 499 F.Supp. 960, 966 (D. Utah 1980), *cert. denied*, 464 U.S. 849 (1983) (Mormon Church School's decision as to which employees best adhere to their faith and best propagate it is "an internal matter exempt from sovereign interference"); *Reardon v. Lemoyne*, 122 N.H. 1042, 1049, 454 A.2d 428, 433 (N.H. 1982) (Contractual grounds for non-renewal or dismissal of teachers of a parish school which "involve doctrinal judgments are clearly beyond the judicial sphere of authority").

In a myriad of situations, such as dismissing a teacher for teaching doctrine at odds with the church's tenets or adopting a lifestyle contrary to the church's moral teaching, the CHRO, if permitted to exercise jurisdiction under the Connecticut Fair Employment Practices Act, would be empowered to determine whether a firing or a failure to hire a teacher was a secular or ecclesiastical concern. *See* Conn. Gen. Stats., Secs. 46a-83, 46a-87. Following a determination that there was a discriminatory practice, the

CHRO would then order the hiring or reinstatement of a teacher, and may even award back pay and damages. *See* Conn. Gen. Stats., Sec. 46a-86. Thus, under this act, the CHRO could order the hiring of a non-Catholic teacher with a more extensive background or greater experience than a Catholic applicant to teach at a Catholic parish school, even where the non-Catholic neither knew nor believed in Catholic doctrine; exemplified by word and conduct a lifestyle contrary to Catholic morals; and even espoused doctrine at odds with the religious practices of the church. Even if the state were to choose the applicant whose beliefs were most closely aligned with Catholic doctrine, it may find itself in a position where it must choose, for example, between a Methodist, a Lutheran and a non-practicing Catholic. The state would then have to determine which applicant's beliefs are most similar to the doctrine taught by the Catholic church and it would have to weigh the validity of the conflicting beliefs. Allowing the state such power would not only burden the church's right to freely exercise its religion by choosing its own teachers, but it would also result in a governmental imprimature of approval on a particular set of beliefs as "Catholic."

Even if the present case were ultimately decided in favor of the church, allowing the CHRO to assume jurisdiction would result in a chilling effect on the church's hiring practices. Mindful of the ever-present threat of a CHRO proceeding, prudence will dictate that the church "steer far wider of the unlawful zone" of impermissible conduct. *See, e.g., Speiser v. Randall*, 357 U.S. 513, 526 (1958). If, for example, a non-Catholic teacher advocated abortion to his or her students, the church would be confronted with the choice of foregoing its right to discharge the heretical employee or doing so at the risk of a protracted and expensive CHRO proceeding which would certainly involve the church's religious policies and beliefs.

The final factor that must be considered under the *Yoder* analysis is whether the government's interest is suffi-

ciently compelling as to override the conflicting First Amendment rights of the church and its members, parents and pupils. The limits on the state's authority to control religious conduct are quite severe. "[I]n this highly sensitive constitutional area '[o]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation.'" *Sherbert v. Verner*, 374 U.S. 198 (1963), quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945). "The conduct or actions so regulated have invariably posed some *substantial threat* to public safety, peace or order." *Id.*, 374 U.S. at 403 (emphasis added). That this showing must be extremely great was evidenced in *Yoder* where the court held that religious liberty overrode even the educational practices of the state that were considered to "rank at the very apex of the function of the state." *Yoder, supra*, 406 U.S. at 213 (1972).

While the prevention of employment discrimination is an admirable goal, the right of a non-Catholic, who is free to seek employment in the vast majority of non-Catholic elementary schools, to be employed by a Catholic Church to teach Catholic faith and moral values to Catholic pupils cannot be held to be so compelling a right as to justify infringing upon the constitutionally-protected rights of the church and its members, parents and pupils to exercise their religion.

It is inconceivable that the First Amendment gives churches the absolute right of freedom to believe, and the right to propagate those beliefs by teaching their children, yet would allow a state agency to shackle them to a determination that people of all religions — or even atheists — are equally suited to that task. Nothing in the language of the Connecticut Fair Employment Practices Act supports such an invasion of the province of a religion to decide who best exemplifies its teachings or will best propagate its doctrine. That is a religious decision exempt from state interference.

The Connecticut Supreme Court, in setting aside the trial court's judgment dismissing the case, held that the

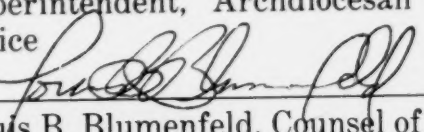
CHRO proceeding could not be forestalled at the investigatory stage simply because First Amendment issues might later be raised if the outcome of the investigatory process was adverse. The court failed to properly consider the argument that the investigation itself constitutes an improper invasion of protected rights. In *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), this court noted that the Labor Relations Board, in resolving factual issues, would necessarily become involved in inquiries into the good faith of the position asserted by the clergy administrators and its relationship to the school's religious mission. Most importantly, the court held that: "It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, *but the very process of inquiry leading to findings and conclusion.*" *Id.*, at 502 (emphasis added). That the very process of inquiry burdens the First Amendment rights of the appellant herein is clear from an examination of the interrogatories propounded. (Appendix F, infra, A-32, 35.)

In reaching its conclusions below, the court misapplied this court's holding in *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 106 S.Ct. 2718 (1986). *Dayton* is inapplicable here for two reasons. First, *Dayton* involved a school operated by a religious organization while the instant case involves a parish parochial school which is operated by, and part and parcel of, an actual church. Second, the complaint in *Dayton* alleged discrimination based on sex while the complaint here is one of religious discrimination. Surely a statute allowing the state to investigate a claim of religious discrimination against a church infringes upon constitutionally-protected religious freedom even if a statute allowing the state to investigate a claim of sex discrimination against a church-related organization does not.

CONCLUSION

Probable jurisdiction should be noted.

APPELLANTS, Archdiocesan School Office and Reverend James G. Fanelli, Superintendent, Archdiocesan School Office

By 

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APPENDIX TO JURISDICTIONAL STATEMENT

APPENDIX A

COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES

v.

ARCHDIOCESAN SCHOOL OFFICE ET AL.

(12719)

Peters, C. J., Healey, Shea, Dannehy and Santaniello, Js.

The commission on human rights and opportunities petitioned the trial court for an order requiring the defendants to answer certain interrogatories propounded to them in connection with the commission's investigation of a complaint of employment discrimination filed by an applicant for a teaching position at a parochial school. The trial court, determining that the Human Rights and Opportunities Act (Secs. 46a-51 through 46a-96) did not extend to religious organizations, granted the named defendant's motion to dismiss, and the commission then appealed. Because it is improper to make a determination of the substantive applicability of an act like the Human Rights and Opportunities Act to a particular case before completion of an investigation expressly authorized to be conducted prior to the institution of a proceeding against one who may have violated the act, held that the motion to dismiss should have been denied because it sought to raise prematurely issues that were not yet ripe for adjudication; the commission's statutorily (Sec. 46a-54[10]) authorized investigation of the complaint could not be forestalled simply because first amendment issues might later be raised if the outcome of the investigatory process were to be adverse to the defendants.

Argued January 6 — decision released March 24, 1987

Petition for an order to require the defendants to respond to interrogatories propounded to them in an administrative action alleging employment discrimination, brought to the Superior Court in the judicial district of Hartford-New Britain at Hartford, where the court, Aspell, J., granted the defendant's motion to dismiss and rendered judgment thereon, from which the plaintiff appealed. *Error; further proceedings.*

Robert B. Teitelman, assistant attorney general, with whom were *Robert E. Walsh*, assistant attorney general, and, on the brief, *Joseph I. Lieberman*, attorney general, and *Arnold B. Feigin* and *Josephine Lauriello*, assistant attorneys general, for the appellee (plaintiff).

Vincent J. Dowling, with whom, on the brief, were *Louis B. Blumenfeld* and *Ellen M. Burns*, for the appellees (defendants).

Shea, J. The trial court granted a motion to dismiss a petition of the commission on human rights and opportunities (CHRO) that had been brought pursuant to General Statutes Sec. 46a-88[1] to require the defendants to answer certain interrogatories relating to its investigation of a complaint of employment discrimination in violation of General Statutes Sec. 46a-60(a)(1).[2] The relator, Susan J. Hunter, had filed a complaint with the CHRO pursuant to General Statutes Sec. 46a-82[3] in which she claimed that she had been denied employment as a teacher at a Catholic parochial school because her religious affiliation was not with the Roman Catholic Church. The court construed the

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1 "[General Statutes] Sec. 46a-88. ENFORCEMENT OF INTERROGATORIES. (a) Upon failure of any person to answer interrogatories issued pursuant to subsection (10) of section 46a-54, the commission may file a petition with the interrogatories attached with the superior court of the judicial district in which the violation is alleged to have occurred or where such person resides or transacts business, requesting the court to order that an answer be filed. . . ."

2 "[General Statutes] Sec. 46a-60. (Formerly Sec. 31-126). DISCRIMINATORY EMPLOYMENT PRACTICES PROHIBITED. (a) It shall be a discriminatory practice in violation of this section: (1) For an employer, by himself or his agent, except in the case of a bona fide occupational qualification or need, to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against him in compensation or in terms, conditions or privileges of employment because of the individual's race, color, religious creed, age, sex, marital status, national origin, ancestry, present or past history of mental disorder, mental retardation or physicial disability, including, but not limited to, blindness. . . ."

3 "[General statutes] Sec. 46a-82. (Formerly Sec. 31-127). COMPLAINT; FILING. (a) Any person claiming to be aggrieved by an

statutory authority of the CHRO, as set forth in the Human Rights and Opportunities Act (HROA), General Statutes Secs. 46a-51 through 46a-96, not to extend to religious organizations as employers and therefore concluded that the commission lacked jurisdiction to require the defendants to respond to the interrogatories it had propounded. We find error and remand the case for further proceedings.

In her sworn complaint, Hunter declared that in June, 1979, she had applied for a position as a first grade teacher at the St. Martin de Porres School in New Haven, that both the pastor of the church and the principal of the school had recommended her for the position after interviewing her, that she was told that a final interview with the individual defendant, the Reverend James G. Fanelli, superintendent of schools for the archdiocese of Hartford was necessary, that Fanelli told her in August, 1979, that he would not interview her because he wanted only Catholic teachers, and that, her religious affiliation being Methodist, she had been denied an employment opportunity because of her religion. On September 25, 1979, a copy of this complaint alleging a violation of General Statutes Sec. 46a-60 was served on the defendant designated as "Archdiocesan School Office." A set of sixteen interrogatories was served on each defendant on June 19, 1981, which were not answered. Claiming that the information sought was needed to investigate the complaint, the CHRO on July 16, 1981, petitioned the Superior Court pursuant to Sec. 46a-88 to order the defendants to respond.

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alleged discriminatory practice, except for an alleged violation of section 46a-68, may, by himself or his attorney, make, sign and file with the commission a complaint in writing under oath, which shall state the name and address of the person alleged to have committed the discriminatory practice, and which shall set forth the particulars thereof and contain such other information as may be required by the commission.

"(b) The commission, whenever it has reason to believe that any person has been engaged or is engaged in a discriminatory practice, may issue a complaint except for a violation of subsection (a) of section 46a-80."

The defendants initially filed a motion to dismiss on nonconstitutional grounds, which the trial court, Vasington, J., denied, a ruling we need not consider in this appeal.[4] On October 22, 1982, another motion to dismiss the petition was filed by the named defendant claiming the CHRO lacked jurisdiction over it because the application of the HROA to church related schools constituted excessive governmental entanglement in the administration of church affairs in violation of the first amendment to our federal constitution.[5]

In granting this motion on March 7, 1985, the trial court, Aspell, J., concluded that, because the application of

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4 The defendants filed the first motion to dismiss the petition on two grounds: (1) that neither of the defendants had been a prospective employer of Susan J. Hunter, the complainant; and (2) that the CHRO was exceeding its statutory authority by invoking an equitable remedy to enforce interrogatories. Attached to this motion was an affidavit of the Reverend James G. Fanelli declaring that he was the superintendent of schools for the Archdiocese of Hartford and was in charge of the Diocesan School Office, a division of the Hartford Roman Catholic Diocesan Corporation; that, to the best of his knowledge, there existed no such entity as the Archdiocesan School Office; and that in his capacity as such superintendent he does not contract with or pay the elementary school teachers who are employed at St. Martin De Porres School in New Haven. After this affidavit had been filed, the petition was amended to designate the Diocesan School Office of the Hartford Roman Catholic Diocesan Corporation as the defendant entity and to refer to Fanelli as the superintendent thereof. A specific prayer for relief in the form of an order to answer the interrogatories, absent from the original petition was also added.

In denying this motion the trial court, Vasington, J., rejected the first ground of the motion to dismiss because Sec. 46a-88 authorizes a petition for an order to respond to interrogatories "[u]pon the failure of any person to answer," not just prospective employers. The court construed the second ground of the motion to implicate only a procedural issue arising from the commencement of the action by means of an order to show cause, which had been obviated by the amendment of the petition.

5 "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const., amend. I.

General Statutes Sec. 46a-60, which prohibits religious discrimination in employment generally, to the defendants would raise serious constitutional questions, the statute should be construed to exempt religious organizations from its coverage. The court relied upon *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), in which the United States Supreme Court, despite a broad definition of employer containing no exemption for church related schools, construed the National Labor Relations Act to provide such an exemption because of the absence of a clear expression of an affirmative intention that teachers in church operated schools should be covered by the act. Finding no such expression of "affirmative intention" to include religious organizations within the ambit of "employer" in Sec. 46a-60, the trial court, declining to resolve the "sensitive" first amendment issues that had been raised, held that the legislature had never intended that such organizations be subject to the jurisdiction of the CHRO.

We have concluded that the named defendant's motion to dismiss should have been denied because it sought to raise prematurely issues that are not yet ripe for adjudication. Despite the considerable time that has elapsed since the relator filed her complaint on September 6, 1979, this proceeding has not advanced beyond the investigatory stage that must be completed before it can be determined whether "there is reasonable cause for believing that a discriminatory practice has been or is being committed as alleged in the complaint . . ." General Statutes Sec. 46a-83(a). The issuance of interrogatories by the CHRO to obtain information relating to any complaint under investigation necessary or useful in making that determination is expressly authorized by General Statutes Sec. 46a-54(10). "Upon failure of any person to answer interrogatories issued pursuant to subsection (10) of section 46a-54, the commission may file a petition . . . with the superior court . . . requesting the court to order that an answer be filed." General Statutes Sec. 46a-88(a).

The CHRO followed this statutory procedure when the defendants failed to respond to the interrogatories served upon them. In a closely analogous situation involving the investigatory powers of the attorney general under a statute authorizing the issuance of subpoenas for that purpose, this court has held that it is improper to make a determination of the substantive applicability of the statute to a particular case before completion of an investigation expressly authorized to be conducted prior to the institution of a proceeding against a person who may have violated the underlying statute. In re *Application of Ajello v. Moffie*, 179 Conn. 324, 325-26, 426 A.2d 295 (1979). "An administrative body so empowered may, by virtue of such authority, develop, without interference or delay, a factual basis for the determination of whether particular activities come within its regulatory authority." *Heslin v. Connecticut Law Clinic of Trantolo & Trantolo*, 190 Conn. 510, 514-15, 461 A.2d 938 (1983). A petition filed pursuant to Sec. 46a-88 does not present the issue of whether the defendants may be exempt from the coverage of the statute they may have violated, but only whether information relevant to the possible violation can be drawn forth. See *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 211, 66 S. Ct. 494, 90 L. Ed. 614 (1946). So long as the interrogatories to be enforced are not plainly irrelevant to any lawful purpose of the CHRO, unduly burdensome, or violative of some privilege or other right of the person to whom they are addressed, the statute requires that they be answered, however doubtful the basis for a violation may appear at this preliminary investigative stage. See *Endicott Johnson Corporation v. Perkins*, 317 U.S. 501, 509, 63 S. Ct. 339, 87 L. Ed. 424 (1943); 1 K. Davis, Administrative Law Sec. 4:6.

We have recognized an exception to the general bar against testing the coverage of a statute in a preliminary investigative proceeding where the legislative authority to empower the agency to conduct the investigation itself is challenged. *Heslin v. Connecticut Law Clinic of Trantolo & Trantolo*, supra, 515; see *Oklahoma Press Publishing Co.*

v. Walling, supra, 209. The trial court, Aspell, J., expressed some concern that the investigative powers of the CHRO, including its statutorily authorized issuance of the interrogatories, posed a risk of infringing upon the first amendment rights of the defendants. The defendants also argue that, even though the issues may ultimately be decided in their favor, any exercise of CHRO jurisdiction might interfere with religious beliefs and practices and thus have a chilling effect on the church's hiring practices.

Similar considerations were advanced and found unpersuasive in the case of *Ohio Civil Rights Commission v. Dayton Christian Schools*, 106 S. Ct. 2719, 91 L. Ed. 2d 512 (1986), in which the United States Supreme Court held that the federal courts should abstain from exercising jurisdiction to enjoin a state civil rights proceeding against a church related school based upon complaints of sex discrimination and infringement of constitutional rights sought to be justified pursuant to religious beliefs. The court concluded that the abstention doctrine, based upon principles of comity and federalism; see *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971); applied to state administrative proceedings involving important state interests, such as the elimination of sex discrimination, so long as in the course of those proceedings there would be an adequate opportunity to raise any constitutional issues. "Even religious schools cannot claim to be wholly free from some state regulation." *Ohio Civil Rights Commission v. Dayton Christian Schools*, supra, 2724. "[T]he Commission violates no constitutional rights by merely investigating the circumstances of [the complainant's] discharge in this case, if only to ascertain whether the ascribed religious based reason was in fact the reason for the discharge." *Id.* We hold similarly that the CHRO investigation may not be forestalled at this point in the proceeding simply because first amendment issues may later be raised if the outcome of the investigatory process is adverse to the defendants.

In this Sec. 46a-88 proceeding it is possible that the defendants may have a cognizable religious reason as well as other grounds for objecting to some of the interrogatories that have been propounded.[6] No such grounds for refusal to answer have yet been presented, nor are they so readily apparent from an examination of the questions that we should now attempt to resolve their propriety. The only issue before us at this time is whether the trial court should have dismissed the petition and we conclude that it erred in doing so.

There is error, the judgment is set aside and the case is remanded to the trial court with direction to deny the motion to dismiss and for further proceedings.

In this opinion the other justices concurred.

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6 Although the motion to dismiss was filed only on behalf of the named defendant, the memorandum of decision as well as the judgment file appears to have granted the motion in respect to both defendants. The parties on appeal have made no point of this irregularity and, in view of the result we reach, it is of no significance.

APPENDIX B

MEMORANDUM OF DECISION

On September 6, 1979, complainant, Susan Hunter, filed a complaint with the Commission on Human Rights and Opportunities (hereinafter "Commission") against defendant, Archdiocesan School Office. Complainant alleges that in July, 1979, she applied for a teaching position at St. Martin de Porres Elementary School in New Haven. In July and August, 1979, she was interviewed and recommended for the position by the pastor and the school principal. On August 27, 1979, she was informed by defendant the Reverend James G. Fanelli, Superintendent of the Archdiocesan School Office, that she would not be granted a final interview with him because she was not Catholic. Complainant is a Methodist. Complainant alleges an unlawful denial of employment on the basis of religion, in violation of Conn. Gen. Stat. Sec. 46a-60 and Title VII of the Civil Rights Act of 1968.

The Commission has undertaken to investigate the complainant's complaint pursuant to Conn. Gen. Stat. Sec. 46a-83. The Commission is empowered to require written answers to interrogatories relating to a complaint under investigation. Conn. Gen. Stat. Sec. 46a-54(10). Pursuant thereto, the Commission served upon defendants a set of sixteen interrogatories to which defendants have failed to respond. Conn. Gen. Stat. Sec. 46a-88(a) provides that upon defendants' failure to answer such interrogatories, the Commission may file a petition with the superior court requesting the court to order an answer be filed. Furthermore, the "court shall assume jurisdiction over the proceedings provided for in this section and may, after hearing, or in the absence of objection, enter an order, which it deems appropriate." Conn. Gen. Stat. Sec. 46a-88(c). Accordingly, on July 16, 1981, the Commission filed a Petition for Ordering Answers to Interrogatories. By motion dated October 20, 1982, defendants have moved to dismiss the Commission's petition for ordering answers to interrogatories for the reason that the Commission lacks

jurisdiction over the defendants. It is defendants' contention that the statutory powers of the Commission are subject to the constitutional limitations of the free exercise and establishment clauses of the United States Constitution and to Article Seventh of the Connecticut Constitution, thereby barring the Commission's rights to proceed in this matter.

The issue to be determined by the court is whether the defendant's motion to dismiss the Commission's petition for ordering answers to Interrogatories should be granted.

A statute ought not be construed to violate the Constitution if any other possible construction remains available. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979); *Murray v. The Charming Betsy*, 2 Cranch 64, 118 (1804). Therefore, prior to addressing any substantive constitutional issues raised by defendants, the court is required to perform a preliminary inquiry to determine whether the legislature did in fact intend that the Commission have jurisdiction over a diocesan school office, a division of the Hartford Roman Catholic Diocesan Corporation. If it is determined that the legislature in fact did not intend that defendants be subject to the challenged statutory provision, there would be no reason for the court to decide the merits of the constitutional issues raised by defendants, thereby avoiding needless determination of serious and difficult constitutional issues. *Catholic Bishop*, 440 U.S. at 500-01; *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 285 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982).

The court's analysis begins with an examination of the statutory scheme embodied in Chapter 814c of the Connecticut General Statutes Secs. 46a-51 to 46a-97, entitled Human Rights and Opportunities, to determine whether application of this statutory scheme to defendants would "give rise to serious constitutional questions." *Catholic Bishop*, 440 U.S. at 501. If so, the court must evaluate whether the legislature "clearly expressed" an affirmative

intention that the statute grant the Commission jurisdiction over employees such as those named here. *Id.*

Chapter 814c states that it shall be discriminatory practice

> [f]or an employer, by himself, or his agent, except in the case of a bona fide occupational qualification or need, to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against him in compensation or in terms, conditions or privileges of employment because of the individual's race, color, religious creed, age, sex, marital status, national origin, ancestry, present or past history of mental disorder, mental retardation or physical disability, including, but not limited to, blindness.

Conn. Gen. Stat. Sec. 46a-60.

Application of the above cited statutory prohibitions to defendants may result in a discriminatory employment practice if defendants decided to employ a Roman Catholic as opposed to a Methodist assuming both individuals were equally qualified. Although the possibility remains that defendants could then exempt themselves under the "bona fide occupational qualification," the fact remains that the employment practices of religious organizations would still come under the Commission's scrutiny by merely applying for such exemption. See *Dayton Christian Schools v. Ohio Civil Rights Commission*, 578 F. Supp. 1004, 1020 (S.D. Ohio 1984).

The Supreme Court has for some time recognized the "critical and unique role of the teacher in fulfilling the mission of a church-operated school." *Catholic Bishop*, 440 U.S. at 501; *Lemon v. Kurtzan*, 403 U.S. 602, 617 (1971).

> In terms of potential involving some aspect of faith or morals in secular subjects, a textbooks' content is ascertainable, but a teacher's handling of a subject is not. We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of precollege education. The conflicts of functions inheres in the situation.

Lemon, 403 U.S. at 617. Moreover

> [u]nder our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn.

Id. at 625. Finally, the court has placed great significance on the "obvious fact that the raison d'etre of parochial schools is the propagation of a religious faith."*Id.* at 628. (Douglas, J., concurring). Therefore it is the opinion of this court that the teacher's critical role in propagating the religious doctrines of the church indicates that any attempt by the state to restrain defendants from inquiring into a job applicant's religious tenents (sic), or to hire on the basis of religion could result in an impermissible interference by the state into the religious philosophy of defendants' administrative policies, their pupils and their parents.

When the provisions describing the Commission's powers and duties are reviewed, they too pose a risk of infringing on defendants' first amendment rights. Those provisions empower the Commission to *inter alia*, hold hearings, subpoena witnesses, require the production of documents and to require written answers to interrogatories. See Conn. Gen.Stat. Sec. 46a-54(8), (10). Moreover, upon the determination that a respondent has engaged in a discriminatory practice, respondent may be required to take "affirmative action," such as, but not limited to, the hiring or reinstatement of employees, the payment of back pay, and damages. *See* Conn. Gen. Stat. Sec. 46a-86.

These provisions empower the Commission with the potential to evaluate sectarian decisions and to investigate and prohibit actions based on religious beliefs. "Parochial school involves substantial religious activity and purpose. The substantial religious character of these church-re-

lated schools gives rise to entangling church-state relationships of the kind with Religion Clauses sought to avoid."*Lemon*, 403 U.S. at 616. Therefore, application of Chapter 814c to defendants would give rise to serious constitutional questions. Accordingly, as noted above, the court must take a second look at the statute in question to determine if the legislature "clearly expressed" an "affirmative intent" that the statute grant the Commission jurisdiction over employees such as these defendants. *Catholic Bishop*, 440 U.S. at 501.

In *Catholic Bishop* it was held that the National Labor Relations Board lacked jurisdiction over lay teachers in church-operated schools because Congress has not affirmatively indicated that it intended them to be covered by the National Labor Relations Act. *Catholic Bishop*, 440 U.S. at 506-07. The Court's conclusion was based on an examination of the statute and its legislative history which indicated that Congress "simply gave no consideration to church-operated schools." *Id.* at 504. It is the opinion of this court that an examination of Chapter 814c and its legislative history compels a similar conclusion here. The legislature defined the Commission's jurisdiction in broad terms, falling short of the affirmative intent required by *Catholic Bishop*. See *e.g.* Conn. Gen. Stat. Sec. 46a-54, enumerating the Commission's powers and duties; Conn. Gen. Stat. Sec. 46a-82, providing that "[a]ny person claiming to be aggrieved by an alleged discriminatory practice" may file a complaint with the Commission; and Conn. Gen. Stat. Sec. 46a-83 empowering a commissioner or investigator to investigate a complaint. Conn. Gen. Stat. Sec. 46a-51(10) defines "employer" as "any person or employer with three or more persons in his employ." Conn. Gen. Stat. Sec. 46a-51(14) defines "person" as "one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers and the state and all political subdivisions and agencies thereof." Although these definitions would facially include defendants, the court concludes that the legislature failed to

specifically include religious institutions within the ambit of Chapter 814c.

The legislative history of Chapter 814c is likewise unilluminating in this analysis providing no indication that the act was to encompass religious institutions within the Commission's jurisdiction. Accordingly, there is an absence of an affirmative expression of the legislature's intent to bring religious organizations within the jurisdiction of the Commission.

Finally, it is important to note that this court in reviewing the motion before it is addressing the propriety of the Commission's preliminary investigation into defendant's alleged discriminatory practices. Whether all or part of the potential constitutional infringements would occur depends in part on how and to what extent the Commission would apply Chapter 814c and how extensive its investigation would become. It is beyond the scope of this court's jurisdiction, however, to try to determine at this time how extensively the Commission would pursue its investigation and to what extent it would enforce Chapter 814c against defendants if a discriminatory practice was in fact found to have occurred. It is for this court to examine only the potential risks. Accordingly, it is this court's opinion that application of Chapter 814c to defendants could raise the same concerns as those found dispositive by the Supreme Court in *Catholic Bishop*. There, as herein

> [t]he resolution of . . . charges . . . , in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.

Catholic Bishop, 440 U.S. at 502.

In conclusion, in the absence of an affirmative legislative intent to bring religious organizations within the jurisdiction of the Commission, this court must decline to address

"difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." *Catholic Bishop*, 440 U.S. at 507. Accordingly, defendant's motion to dismiss the Commission's petition for ordering answers to interrogatories is granted.

Mary F. Aspell, J.

Filed March 7, 1985

STATE OF CONNECTICUT

#CV81-26 20 32 COMMISSION ON HUMAN RIGHTS & OPPORTUNITIES, EX REL, SUSAN J. HUNTER, an agency of the State of Connecticut	SUPERIOR COURT HARTFORD/ NEW BRITAIN
vs.	
ARCHDIOCESAN SCHOOL OFFICE of Hartford, Connecticut; and REVEREND JAMES G. FANELLI, Superintendent, Archdiocesan School Office, of Hartford, Connecticut	JUDICIAL DISTRICT at HARTFORD MARCH 7, 1985

PRESENT: HONORABLE MARY FITZGERALD ASPELL, JUDGE

JUDGMENT

This petition, by writ and complaint dated July 16, 1981 and claiming a failure by the defendants to respond to interrogatories served on them by the plaintiff pursuant to state statute, came to this Court on the 18th day of August, 1981 and thence to October 22, 1982 when the defendants filed a Motion to Dismiss said action for lack of jurisdiction and thence to the present time when the parties appeared and were at issue, as on file.

The Court, having heard the parties, finds that the legislature did not specifically include religious institutions within the ambit of the state statute at issue, that the Court thus lacks jurisdiction, and that the defendants' Motion to Dismiss should be and is hereby granted.

WHEREUPON, it is adjudged that the plaintiff's petition be and is hereby dismissed.

By the Court

Jonathan W. Field
First Assistant Clerk

APPENDIX C

STATE OF CONNECTICUT
SUPREME COURT

NO. 12719

COMMISSION ON HUMAN
RIGHTS & OPPORTUNITIES

APRIL 16, 1987

V.

ARCHDIOCESAN SCHOOL
OFFICE ET AL

O R D E R

THE MOTION OF THE DEFENDANTS FILED APRIL 3, 1987 FOR REARGUMENT, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY ORDERED DENIED.

BY THE COURT

s/_____
ASSISTANT CLERK-APPELLATE

NOTICE SENT: 4/16/87
Joseph Lieberman, A.G.
Robert Walsh, A.A.G.
Josephine Lauriello, A.A.G.
J. Sarah Posner, A.A.G. Robert B. Teitelman, A.A.G.
Cooney, Scully and Dowling
Hon. Mary F. Aspell
Clerk, Superior Cpourt, Hartford
CV 81 262032

APPENDIX D

NO. 12719

COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES	: SUPREME COURT
VS.	: STATE OF CONNECTICUT
ARCHDIOCESAN SCHOOL OFFICE, ET AL	: JULY 15, 1987

NOTICE OF APPEAL

Notice is hereby given that Archdiocesan School Office and Reverend James G. Fanelli, Superintendent, Archdiocesan School Office, the defendants above named, hereby appeal to the Supreme Court of the United States from the final decision of the Connecticut Supreme Court on March 24, 1987, rehearing denied on April 16, 1987, which set aside the judgment of the Connecticut Superior Court granting the defendants' "Motion to Dismiss the Plaintiff's Petition for Ordering Answers to Interrogatories."

This appeal is taken pursuant to 28 U.S.C. Sec. 1257(2).

APPELLANTS, Archdiocesan School Office and Reverend James G. Fanelli, Superintendent, Archdiocesan School Office,

By _____

Louis B. Blumenfeld for
Cooney, Scully and Dowling
266 Pearl Street
Hartford, Connecticut 06103

CERTIFICATION

I hereby certify that a copy of the foregoing Notice of Appeal, which was filed in the Connecticut Supreme Court on July 14, 1987, was served upon the Commission on Human Rights and Opportunities, by mailing a copy, postage prepaid, to Joseph I. Lieberman, Attorney General, at 30 Trinity Street, Hartford, Connecticut on July 15, 1987.

I further hereby certify that a copy of the foregoing Notice of Appeal was also filed in the Superior Court for the Judicial District of Hartford/New Britain at Hartford on July 15, 1987.

I further hereby certify that all parties required to be served have been served.

_____

Louis B. Blumenfeld

APPENDIX E

SEC. 46a-54. *Commission Powers*

The commission shall have the following powers and duties:

(7) To receive, initiate as provided in section 46a-82, investigate and mediate discriminatory practice complaints;

(8) By itself or with or by hearing examiners, to hold hearings, subpoena witnesses and compel their attendance, administer oaths, take the testimony of any person under oath and require the production for examination of any books and papers relating to any matter under investigation or in question;

(10) To require written answers to interrogatories under oath relating to any complaint under investigation pursuant to this chapter alleging any discriminatory practice as defined in subdivision (8) of section 46a-51, and to adopt regulations in accordance with the provisions of chapter 54 for the procedure for the issuance of interrogatories and compliance with interrogatory requests.

SEC. 46a-60. *Discriminatory employment practices prohibited*

(a) It shall be a discriminatory practice in violation of this section:

(1) For an employer, by himself or his agent, except in the case of a bona fide occupational qualification or need, to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against him in compensation or in terms, conditions or privileges of employment because of the individual's race, color, religious creed, age, sex, marital status, national origin, ancestry, present or past history of mental disorder, mental retardation or physical disability, including, but not limited to, blindness;

(2) For any employment agency, except in the case of a bona fide occupational qualification or need, to fail or

refuse to classify properly or refer for employment or otherwise to discriminate against any individual because of his race, color, religious creed, age, sex, marital status, national origin, ancestry, present or past history of mental disorder, mental retardation or physical disability, including, but not limited to, blindness;

(3) For a labor organization, because of the race, color, religious creed, age, sex, marital status, national origin, ancestry, present or past history of mental disorder, mental retardation or physical disability, including, but not limited to, blindness of any individual to exclude from full membership rights or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer, unless such action is based on a bona fide occupational qualification;

(4) For any person, employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he has opposed any discriminatory employment practice or because he has filed a complaint or testified or assisted in any proceeding under section 46a-82, 46a-83 or 46a-84;

(5) For any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any act declared to be a discriminatory employment practice or to attempt to do so;

(6) For any person, employer, employment agency or labor organization except in the case of a bona fide occupational qualification or need, to advertise employment opportunities in such a manner as to restrict such employment so as to discriminate against individuals because of their race, color, religious creed, age, sex, marital status, national origin, ancestry, present or past history of mental disorder, mental retardation or physical disability, including, but not limited to blindness;

(7) For an employer, by himself or his agent: (A) To terminate a woman's employment because of her preg-

nancy; (B) to refuse to grant to that employee a reasonable leave of absence for disability resulting from her pregnancy; (C) to deny to that employee, who is disabled as a result of pregnancy, any compensation to which she is entitled as a result of the accumulation of disability or leave benefits accrued pursuant to plans maintained by the employer; (D) to fail or refuse to reinstate the employee to her original job or to an equivalent position with equivalent pay and accumulated seniority, retirement, fringe benefits and other service credits upon her signifying her intent to return unless, in the case of a private employer, the employer's circumstances have so changed as to make it impossible or unreasonable to do so; (E) to fail or refuse to make a reasonable effort to transfer a pregnant employee to any suitable temporary position which may be available in any case in which an employee gives written notice of her pregnancy to her employer and the employer or pregnant employee reasonably believes that continued employment in the position held by the pregnant employee may cause injury to the employee or fetus; (F) to fail or refuse to inform the pregnant employee that a transfer pursuant to subparagraph (E) of this subdivision may be appealed under the provisions of this chapter; or (G) to fail or refuse to inform his employees, by any reasonable means, that they must give written notice of their pregnancy in order to be eligible for transfer to a temporary position;

(8) For an employer, by himself or his agent, for an employment agency, by itself or its agent, or for any labor organization, by itself or its agent, to harass any employee, person seeking employment or member on the basis of sex. "Sexual harassment" shall, for the purposes of this section, be defined as any unwelcome sexual advances or requests for sexual favors or any conduct of a sexual nature when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the

purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment;

(9) For an employer, by himself or his agent, for an employment agency, by itself or its agent, or for any labor organization, by itself or its agent, to request or require information from an employee, person seeking employment or member relating to the individual's child bearing age or plans, pregnancy, function of the individual's reproductive system, use of birth control methods, or the individual's familial responsibilities, unless such information is directly related to a bona fide occupational qualification or need, provided an employer, through a physician may request from an employee any such information which is directly related to workplace exposure to substances which may cause birth defects or constitute a hazard to an individual's reproductive system or to a fetus if the employer first informs the employee of the hazards involved in exposure to such substances;

(10) For an employer, by himself or his agent, after informing an employee, pursuant to subdivision (9) of this subsection, of a workplace exposure to substances which may cause birth defects or constitute a hazard to an employee's reproductive system or to a fetus, to fail or refuse, upon the employee's request, to take reasonable measures to protect the employee from the exposure or hazard identified, or to fail or refuse to inform the employee that the measures taken may be the subject of a complaint filed under the provisions of this chapter. Nothing in this subdivision is intended to prohibit an employer from taking reasonable measures to protect an employee from exposure to such substances. For the purpose of this subdivision, "reasonable measures" shall be those measures which are consistent with business necessity and are least disruptive of the terms and conditions of the employee's employment.

(b) (1) The provisions of this section concerning age shall not apply to: (A) The termination of employment of

any person who has attained the age of seventy and is entitled to benefits under any pension or retirement plan or system provided for state or municipal employees or for teachers in the public schools of the state or under a pension or retirement plan or system provided for employees of an institution of higher education; (B) the termination of employment of any person who has attained the age of sixty-five and who, for the two years immediately preceding such termination, is employed in a bona fide executive or a high policy-making position, if such person is entitled to an immediate nonforfeitable annual retirement benefit under a pension, profit-sharing, savings or deferred compensation plans, or any combination of such plans, from his employer, which equals, in aggregate, at least forty-four thousand dollars; (C) the termination of employment of persons in occupations, including police work and firefighting, in which age is a bona fide occupational qualification; (D) the operation of any bona fide apprenticeship system or plan; or (E) the observance of the terms of a bona fide seniority system or any bona fide employee benefit plan for retirement, pensions or insurance which is not adopted for the purpose of evading said provisions, except that no such plan may excuse the failure to hire any individual and no such system or plan may require or permit the termination of employment on the basis of age. No such plan may reduce the group hospital, surgical or medical insurance coverage provided under the plan to any employee who has reached the age of sixty-five and is eligible for Medicare benefits exccept to the extent such coverage is provided by Medicare.

(2) No employee, as a result of the provisions of this section concerning age, may receive a retirement benefit in excess of the maximum retirement benefit payable to such employee under the terms of any bona fide retirement or pension plan applicable to the employee in effect on January 1, 1979, except where mutually agreed upon by employer and employee.

(3) The provisions of this section concerning age shall not prohibit an employer from requiring medical examinations for employees for the purpose of determining such employees' physical qualification for continued employment.

(4) Any employee who continues employment beyond the date on which he becomes eligible for the maximum possible retirement benefit available to him shall give notice of intent to retire, in writing, to his employer not less than thirty days prior to the date of such retirement.

SEC. 46a-83. *Complaint: Investigation; conciliation; disclosure; subpoena*

(a) After the filing of any discriminatory practice complaint, the chairman of the commission shall refer the same to a commissioner or investigator to investigate and if the commissioner or investigator determines after the investigation that there is reasonable cause for believing that a discriminatory practice has been or is being committed as alleged in the complaint, he shall endeavor to eliminate the practice complained of by conference, conciliation and persuasion.

(b) No commissioner or investigator may disclose what has occurred in the course of such endeavors provided the commission may publish the facts in the case and any complaint which has been dismissed and the terms of conciliation when a complaint has been adjusted.

(c) In the investigation of any complaint filed pursuant to this chapter, the commission may issue subpoenas requiring the production of records and other documents relating to the complaint under investigation. (1980, P.A. 80-422, Sec.31.)

SEC. 46a-88. *Enforcement of interrogatories*

(a) Upon failure of any person to answer interrogatories issued pursuant to subsection (10) of section 46a-54, the commission may file a petition with the interrog-

atories attached with the superior court of the judicial district in which the violation is alleged to have occurred or where such person resides or transacts business, requesting the court to order that an answer be filed.

(b) The commission shall cause a copy of the petition provided for in subsection (a) of this section to be sent by registered or certified mail to the person from whom such answers are sought or his legal representative.

(c) The court shall assume jurisdiction over the proceedings provided for in this section and may, after hearing, or in the absence of objection, enter an order which it deems appropriate.

(d) The proceedings provided for in this section shall conform to the rules of practice of the superior court. (1980, P.A. 80-422, Sec. 36.)

APPENDIX F

PETITION FOR ORDERING ANSWERS TO INTERROGATORIES

1. The Commission on Human Rights and Opportunities is the agency of the State of Connecticut charged with the duty to receive, investigate, and proceed in all complaints of discriminatory practices by Conn. Gen. Stat., Secs. 46a-56 and 46a-83.

2. The defendant, Archdiocesan School Office, is an "employer" as defined by Conn. Gen. Stat., Sec. 46a-51(10).

3. The defendant, The Reverend James G. Fanelli, is Superintendent of the Archdiocesan School Office.

4. On September 6, 1979, pursuant to Conn. Gen. Stat., Sec. 31-127 (now Sec. 46a-82), a complaint was filed by Susan J. Hunter against the Archdiocesan School Office alleging a violation of Conn. Gen. Stat., Sec. 31-126(a) (now Sec. 46a-60). (Exhibit A).

5. Said complaint was served on the Archdiocesan School Office on September 25, 1979. (Exhibit B).

6. Said complaint was assigned to David L. Metzger, a supervisor and investigator employed by the Commission, for investigation pursuant to Conn. Gen. Stat., Sec. 31-127 (now Sec. 46a-83).

7. On June 19, 1981, the defendants, The Reverend James G. Fanelli and the Archdiocesan School Office were served with interrogatories pursuant to Conn. Gen. Stat. Sec. 46a-54(10). (Exhibit C).

8. To date, defendants have failed or refused to respond to said interrogatories.

9. The information sought by way of said interrogatories is necessary for the Commission to properly carry out its statutory function of investigating the aforesaid complaint.

PLAINTIFF, COMMISSION
ON HUMAN RIGHTS AND
OPPORTUNITIES

By J. Sarah Posner
Asst. Attorney General
Its Attorney

Dated July 16, 1981

EXHIBIT A

COMPLAINT AFFIDAVIT

STATE OF CONNECTICUT

COMMISSION ON HUMAN RIGHTS
AND OPPORTUNITIES

Commission on Human rights and opportunities on the Complaint of:	COMPLAINT AFFIDAVIT
Susan Hunter Complainant	Complaint No. 8010094
vs.	
Archdiocesan School Office Respondent	Date: 9/6/79

I, Susan Hunter residing at 189 Dessa Drive, Hamden, Ct. charge Archdiocesan School Office whose address is 125 Market Street, Hartford, Ct. with an unlawful discriminatory practice relating to employment at Hartford on or about 8/27/79 by denying me a job in violation of section(s) (include applicable subsection(s)) 31-126(a) of the Connecticut General Statutes, as amended, because of my Religious Creed (Methodist).

More specifically:

1. My name is Susan Hunter and I reside at 189 Dessa Drive, Hamden, Ct.

2. Respondent is Archdiocesan School Office and they are located at 125 Market Street, Hartford, Ct.

3. On or about June 1979, I applied for a position as a first grade teacher with respondent for St. Martin de Porres School in New Haven, Ct.

4. In July and August, 1979, I was interviewed and recommended for the position by Rev. Raymond J. Barry, respondent's pastor, and Sister Josita, respondent's principal.

5. I was told that I must have a final interview with Father Fanelli, respondent's superintendent.

6. On or about August 27, 1979, Father Fanelli told me he would not interview me because he wanted only Catholic teachers.

7. I am Methodist.

8. I believe respondent denied me an employment opportunity because of my religion, Methodist.

Therefore, I request that Ct. Commission on Human Rights to investigate my complaint according to Ct. Statute 31-126(a) and Title VII of the Civil Rights Act of 1968 (as amended in March 1972) and secure for me any remedy to which I am entitled.

Susan Hunter being duly sworn, on oath, states that she is the Complainant herein; that she has read the foregoing complaint and knows the contents thereof; that the same is true of her own knowledge, except as to the matters therein stated on information and belief and that as to these matters she believes same to be true.

Dated at New Haven, Connecticut, this 6th day of Sept. 1979.

Susan J. Hunter

Subscribed and sworn to before me this 6th day of September, 1979.

Catherine Bysiecicz
Notary Public
My Commission expires
April 1, 1983

EXHIBIT B

September 25, 1979

Superintendent
Archdiocesan School Office
125 Market Street
Hartford, CT 06103

Capitol Region
1229 Albany Avenue
Hartford, Connecticut
566-7710

Re: Case # 8010094
Susan Hunter v. Archdiocesan
School Office

Dear Madam/Sir:

This is to serve you with notice that the above entitled complaint has been filed with this Commission. A copy of the Complaint is attached.

This Commission is required by Connecticut General Statutes, Sec. 31-127, to investigate complaints filed with it. Investigations, once begun, often entail the issuance of interrogatories and subpoenas, both enforceable by court order, see *Conn. Gen. Stat.* Sec. 31-127. A finding of reasonable cause then requires that efforts be made to eliminate the practice complained of by conference, conciliation, and persuasion. A public hearing on the complaint is inevitable if conciliation is unsuccessful.

Commission policy requires your answer to the allegations set out in the complaint. Please state whether you

admit or deny each allegation. For example, if you agree with paragraph one, you should state "paragraph one, admit." If you disagree with paragraph one, you should state "paragraph one, deny" and set out the fact on which you rely for your denial and attach any supporting documents.

The Commission also requires submission of the documents enumerated in Schedule A, attached. It is imperative that you retain all records that may be relevant to the matter whether or not requested at this time. Your response would be appreciated within fifteen business days of receipt of this letter.

Please note that *Conn. Gen. Stat.* Sec. 31-126(d) states that "It shall be an unfair employment practice for any person, employer, labor organizations or employment agency to discharge, expel, or otherwise discriminate against any person because he has opposed any unfair employment practice or because he has filed a complaint or testified or assisted in any procedure under Sec. 31-127."

The Commission prefers to resolve complaint (sic) expeditiously. If you would like to resolve this matter immediately by offering a settlement to the complainant, please contact me at the above address or telephone number, and I will be happy to fully discuss the matter with you.

Your cooperation at this initial stage may provide this Commission with the information necessary to resolve the complaint with the greatest possible economy. Please contact me if I can be of any assistance.

Very truly yours,

David L. Metzger, Supervisor
Capitol Region

EXHIBIT C(1)

STATE OF CONNECTICUT

COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES

Susan Hunter
COMPLAINANT

vs. CASE # 8010094

Archdiocesan School Office
RESPONDENT

INTERROGATORY

TO: Reverend James G. Fanelli
Superintendent of Schools
Diocesan School Office
Archdiocese of Hartford
125 Market Street
Hartford, Connecticut 06103

GENTLEMEN:

PLEASE TAKE NOTICE that the Commission on Human Rights and Opportunities, pursuant to *Conn. Gen. Stat.* Sec. 46a-54(7) (formerly Sec. 31-125); Sec. 46a-56(3) (Formerly Sec. 31-123); Sec. 46a-83(a) (formerly Sec. 31-127) and Sec. 46a-54(10) (formerly Sec. 31-125) hereby demands answers to the following interrogatories under oath. This demand is part of the investigation of the attached complaint affidavit of a discriminatory employment practice filed with the Commission.

DIRECTIONS:

1. If additional space is needed, attach additional sheets.

2. The answers will be due 14 business days from the day you receive this Interrogatory.

1. If the full legal name and address of the Respondent named in the attached complaint affidavit is inaccurate, state the full and correct name and address.

2. State the name, address, phone number and title of the individual who will provide further information concerning the subject matter of this interrogatory.

3. If the name and address of the Complainant in the attached complaint affidavit is inaccurate as you know it, state it as you know it.

4. Did the Complainant apply for employment at the time and place stated in allegation #3 of the attached complaint or at any other time or place within 180 days prior to filing of this complaint?

5. Was Complainant interviewed? If yes,

   a) WHEN

   b) BY WHOM

   c) WHERE

6. Was Complainant advised of a final interview? If yes,

   a) WHO was to interview Complainant?

7. Did Father Fanelli advise Complainant on August 27, 1979, he would not interview her?

8. Did Father Fanelli further state he wanted only Catholic Teachers?

9. Is Respondent aware of Complainant's religion?

10. How did Respondent gain this knowledge?

11. Complainant was not employed because:
    (State reasons in full detail)

12. Describe in detail the procedure by which applicants for employment are received at the establishment to which Complainant allegedly applied.

13. State the names, addresses, telephone numbers, and positions of all persons, who were, on the date of the alleged application, authorized to receive and process applications for employment.

14. Describe qualifications for Grade I teacher.

15. Describe Complainant's qualifications for said position as outlined on her application/resume 'copy of application and/or resume' may be provided).

16. Describe in detail the applications and all other qualifying documents, including test results of the last five persons hired before the Complainant applied and of all persons hired subsequent to the Complainant's application. (copies may be provided in lieu of answering this question.)

_____

Signature of Person Completing Interrogatory

_____

_____

Name and Title of Person Completing Interrogatory (Print or Type)

Sworn to and subscribed to before me this _____ day of _____, 19_____

_____

NOTARY PUBLIC

EXHIBIT C(2)

STATE OF CONNECTICUT
COMMISSION ON HUMAN RIGHTS
AND OPPORTUNITIES

Susan Hunter
COMPLAINANT

vs. CASE # 8010094

Archdiocesan School Office
RESPONDENT

INTERROGATORY

TO: Archdiocesan School Office
125 Market Street
Hartford, Connecticut 06103
c/o Reverend James G. Fanelli

GENTLEMEN:

PLEASE TAKE NOTICE that the Commission on Human Rights and Opportunities, pursuant to *Conn. Gen. Stat.* Sec. 46a-54(7) (formerly Sec. 31-125); Sec. 46a-56(3) (Formerly Sec. 31-123); Sec. 46a-83(a) (formerly Sec. 31-127) and Sec. 46a-54(10) (formerly Sec. 31-125) hereby demands answers to the following interrogatories under oath. This demand is part of the investigation of the attached complaint affidavit of a discriminatory employment practice filed with the Commission.

DIRECTIONS:

1. If additional space is needed, attach additional sheets.

2. The answers will be due 14 business days from the day you receive this Interrogatory.

1. If the full legal name and address of the Respondent named in the attached complaint affidavit is inaccurate, state the full and correct name and address.

2. State the name, address, phone number and title of the individual who will provide further information concerning the subject matter of this interrogatory.

3. If the name and address of the Complainant in the attached complaint affidavit is inaccurate as you know it, state it as you know it.

4. Did the Complainant apply for employment at the time and place stated in allegation #3 of the attached complaint or at any other time or place within 180 days prior to filing of this complaint?

5. Was Complainant interviewed? If yes,

   a) WHEN

   b) BY WHOM

   c) WHERE

6. Was Complainant advised of a final interview? If yes,

   a) WHO was to interview Complainant?

7. Did Father Fanelli advise Complainant on August 27, 1979, he would not interview her?

8. Did Father Fanelli further state he wanted only Catholic Teachers?

9. Is Respondent aware of Complainant's religion?

10. How did Respondent gain this knowledge?

11. Complainant was not employed because:
    (State reasons in full detail)

12. Describe in detail the procedure by which applicants for employment are received at the establishment to which Complainant allegedly applied.

13. State the names, addresses, telephone numbers, and positions of all persons, who were, on the date of the alleged application, authorized to receive and process applications for employment.

14. Describe qualifications for Grade I teacher.

15. Describe Complainant's qualifications for said position as outlined on her application/resume 'copy of application and/or resume' may be provided).

16. Describe in detail the applications and all other qualifying documents, including test results of the last five persons hired before the Complainant applied and of all persons hired subsequent to the Complainant's application. (copies may be provided in lieu of answering this question.)

_____

Signature of Person Completing Interrogatory

_____

_____

Name and Title of Person Completing Interrogatory (Print or Type)

Sworn to and subscribed to before me this _____ day of _____, 19_____

_____

NOTARY PUBLIC

STATE OF CONNECTICUT)
)
) ss. HARTFORD, July
) 16, 1981

EXHIBIT D

AFFIDAVIT

David L. Metzger of Hartord, Connecticut, being duly sworn deposes and says:

1. That he is over the age of eighteen years and recognizes the obligations of an oath.

2. That he is a Supervisor and Investigator for the State of Connecticut Commission on Human Rights and Opportunities. (Commission)

3. That his duties in said capacities include the investigation of discriminatory employment practices on ac-

count of religious creed made pursuant to *Conn. Gen. Stat.* Sec. 31-126 (now Sec. 46a-60) and Sec. 31-127 (now Sec. 46a-82 and Sec. 46a-83).

4. That acting pursuant to said statutory authority, he is participating in an investigation of a discriminatory employment practice based upon religious creed against the Archdiocesan School Office, 125 Market Street, Hartford, Connecticut 06103.

5. That acting pursuant thereto, and in accordance with *Conn. Gen. Stat.* Sec. 31-125(j) (now Sec. 46a-54(10), said Commission issued Interrogatories relating to said complaint thereby compelling the Defendants to provide written answers that will assist the Commission in determining whether a discriminatory practice has occurred.

6. That subsequent to service of said Interrogatories, the Defendants have failed or refused to provide written answers to said Interrogatories relating to the complaint under investigation.

7. The failure or refusal of the Defendants to comply effectively prohibits further investigation necessary to meet the exigencies of this matter.

David L. Metzger

Subscribed and sworn to before me this 16th day of July 1981.

J. Sarah Posner
Commissioner of the Superior Court

APPENDIX G

NO. 262032

COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES, ET AL	: SUPERIOR COURT
VS.	: JUDICIAL DISTRICT OF HARTFORD/ NEW BRITAIN AT HARTFORD
ARCHDIOCESAN SCHOOL OFFICE	: OCTOBER 20, 1987

DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' PETITION FOR ORDERING ANSWERS TO INTERROGATORIES

The defendant respectfully moves to dismiss the plaintiffs' Petition for Ordering Answers to Interrogatories for the reason that plaintiff Commission lacks jurisdiction over the named defendant, as more fully set forth in the accompanying Memorandum of Law.

DEFENDANT, ARCHDIOCESAN SCHOOL OFFICE,

BY _____

Maura Connelly Chasse for
Cooney, Scully and Dowling
266 Pearl Street
Hartford, Connecticut 06103
527-1141, Juris No. 10872

ORAL ARGUMENT REQUESTED,
TESTIMONY NOT REQUIRED.

O R D E R

SO ORDERED, this day of , 1982.

BY THE COURT,

_____

Clerk

I hereby certify that a copy of the foregoing was mailed to all counsel of record on October 20, 1982.

_____

Maura Connelly Chasse

NO. 262032

COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES, ET AL	: SUPERIOR COURT
VS.	: JUDICIAL DISTRICT OF HARTFORD/ NEW BRITAIN AT HARTFORD
ARCHDIOCESAN SCHOOL OFFICE	: OCTOBER 20, 1987

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S PETITION FOR ORDERING ANSWERS TO INTERROGATORIES

I. INTRODUCTION

On September 6, 1979, the plaintiff, Susan Hunter, filed a Complaint Affidavit with the Commission on Human Rights and Opportunities against the Archdiocesan School Office. In said Complaint, the plaintiff alleges that in July, 1979, she made application for a teaching position at St. Martin de Porres Elementary School in New Haven, Connecticut. In July and August, 1979, she was interviewed by the school parish's pastor and the school principal. She further claims that on August 27, 1979, she was informed that she would not be granted the final interview

for the reason that she was not Catholic. Plaintiff alleges an unlawful denial of employment opportunity because of religion, in violation of Section 46a-60 (formerly Section 31-126(a)) of the Connecticut General Statutes and Title VII of the Civil Rights Act of 1968.

The Commission on Human Rights and Opportunities has undertaken to investigate the plaintiff's Complaint, pursuant to Connecticut General Statutes, Section 46a-54(10) (formerly Section 31-125(j)), and has moved the Court to order the defendant to answer the interrogatories which have been served by the Commission. The defendant objects to such an order for the reason that the Commission lacks jurisdiction over this defendant, as more fully set forth below.

Connecticut General Statutes, Section 46a-88 (formerly Section 31-215(j)) provides that the Commission on Human Rights and Opportunities may require written answers to interrogatories relating to a complaint under investigation pursuant to the Connecticut Fair Employment Practices Act and that, upon failure of the Respondent to provide answers, it may request the Court to order that a response be filed. "The Court shall assume jurisdiction over such proceedings provided for in this section and may, after hearing, or in the absence of objections, enter an order which it deems appropriate." Conn. Gen. Stat., Section 46a-88 (formerly Section 31-125(j)).

The defendant does not contest the Commission's statutory right to certain limited discovery with respect to matters within its jurisdiction. The question is not the Commission's right to submit interrogatories upon *a* complaint filed by *a* complainant. The question, rather, is the Commission's right to require written answers to interrogatories from *this* defendant on *this* complaint. (See *Waterbury v. Commission on Human Rights and Opportunities*, 160 Conn. 226, 232, 278 A.2d 771 (1971).) The constitutional issue, more simply stated, is whether the jurisdiction of the Commission extends to churches. The powers granted by statute to the Commission on Human Rights and Oppor-

tunities are subject to the constitutional limitations of the free exercise and establishment clauses of the United States Constitution, which clearly bar any right to proceed in this action.

II. DISCUSSION

APPLICATION OF THE CONNECTICUT FAIR EMPLOYMENT PRACTICES ACT TO A CHURCH IS BARRED BY THE FIRST AMENDMENT FOR THE REASON THAT IT CONSTITUTES EXCESSIVE GOVERNMENTAL ENTANGLEMENT IN THE ADMINISTRATION OF CHURCH SCHOOLS.

Parish schools are but an arm and extension of the parish church, wherein the pupils are instructed in Roman Catholic tenets and doctrine. "The Roman Catholic Canons provide, in substance, that Roman Catholic children shall be taught nothing contrary to the Catholic faith and good morals and that religious and moral training shall occupy the principal place in the school curriculum." *Snyder v. Newtown*, 147 Conn. 374, 377, 161 A.2d 770 (1960).

Title VII of the Civil Rights Act of 1964, as amended, specifically exempts educational institutions from the application of its provisions. Specifically, 42 U.S.C. Sec. 2000e-1 reads:

> This Title shall not apply . . . to a religious corporation, association, educational institution or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such . . . institution of its activities.

42 U.S.C., Sec. 2000e-2(e) further provides:

> Notwithstanding any of the provisions of this Title, it shall not be an unlawful employment practice for a school, college, university or other educational institution or institution of learning to hire an employee of a particular religion if such school, college, university or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or so-

ciety or if the curriculum of such school, college, university or other educational institution or institution of learning is directed toward the propagation of a particular religion.

A federal court recently upheld as constitutional the provision of Title VII which exempts religious educational institutions from federal religious employment discrimination laws. *Larsen v. Kirkham*, 499 F. Supp. 960 (D. Utah 1980). The Court in *Larsen* termed the Mormon Church School's decision as to which employees best adhere to their faith and best propogate it "an internal matter exempt from sovereign interference." *Larsen* at 963. Federal law clearly recognizes religion as exempt from the Civil Rights Act of 1964. It reflects a consideration of the constitutional issues surrounding the impermissibility of governmental interference in church affairs.

The Connecticut Fair Employment Practices Act, Conn. Gen. Stat. Section 46a-82 et seq. (formerly Section 31-122, et seq.) does not contain a similar *express* exemption. While Title VII, as written, does not specifically preempt the Connecticut statute governing employment practices, and although the language of the Connecticut statute is slightly different, it was the intent of the Legislature that it be coextensive with the federal law. *Pik-Kwik Stores, Inc. v. Commission on Human Rights and Opportunities*, 170 Conn. 327, 365 A.2d 1210 (1976). The purpose of the Connecticut statute is to prohibit employer discrimination based on immutable characteristics such as race, color, national origin or sex. *Pik-Kwik, supra.* The Court in *Pik-Kwik, supra*, held that a hiring policy which discriminates on a ground other than an immutable characteristic is related more closely to an employer's choice of how to run a business rather than to equality of opportunity and, as such, is not impermissible. Religion is not included among these immutable characteristics. Thus, an exemption for religious institutions, similar to that contained in Title VII, must be imputed. The alternative would be to hold Conn. Gen. Stat., Section 46a-82 et seq. (formerly Section 31-122, et seq.) unconstitutional if and to the extent that

it purports to apply to a church in the conduct of its educational program. The more desirable and logical interpretation is that exemption of churches is implied and intended.

There exists substantial similarity between the above-cited portions of The Civil Rights of 1964 and the Connecticut Fair Employment Practices Act. Where there is identity between a state statute and a federal law, the construction placed on the latter would be applicable to the former. *United Aircraft Corp. v. International Ass'n of Machinists*, 161 Conn. 79, 85, 285 A.2d 330 (1971); *Benoit v. Amalgamated Local 229*, 150 Conn. 266, 274, 188 A.2d 499 (1963). It is further well established that there exists a presumption in statutory construction that the legislature intended to enact a constitutional statute. *Cedar Island Improvement Ass'n v. Clinton Electric Light & Power Co.*, 142 Conn. 359, 372, 114 A.2d 535 (1955).

In analyzing the constitutionality of the Connecticut statute, it is essential to note the recent United States Supreme Court decisions interpreting the religion clauses of the First Amendment. While a number of Supreme Court cases involve challenges by taxpayers to state statutes providing state aid to parochial schools as violative of the Establishment Clause, the concept of excessive governmental entanglement with religion has developed so as to be applicable to the reverse situation, i.e. where the church is the complainant. The Supreme Court's rulings on questions regarding the federal Constitution are binding on the state courts. *Snyder v. Newton, supra.*

The three-pronged test for determining the validity of legislation under the Establishment Clause is that (1) it has a secular legislative purpose, (2) it neither advance nor inhibit religion, and (3) it does not foster excessive governmental entanglement with religion. *Wolman v. Walter*, 433 U.S. 229, 47 S.Ct. 2593 (1979). In *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, reh. den. 404 U.S. 876 (1971), the issue was whether the religion clauses of the First Amendment were violated by the state statutes providing state

aid to church-related elementary and secondary schools and to teachers therein with respect to instruction on secular subjects. The Court held that such statutes were unconstitutional in that they fostered, by the cumulative impact, excessive entanglement between government and religion.

Meek v. Pittinger, 421 U.S. 349, 95 S.Ct. 1753 (1975) was an action by taxpayers challenging the constitutionality of certain Pennsylvania statutes authorizing public school authorities to lend or supply textbooks, materials and services to parochial schools. The Court distinguished textbook loan provision as permissible for the reason that the books were lent directly to the students and the financial benefit was to the students and their parents. The Court struck the remaining portions of the statutes as an unconstitutional entanglement between church and state.

In an action to determine the validity of a Connecticut statute authorizing the state to contract with parochial elementary and secondary schools for the purchase by the state of "secular educational services," the Court held this to be excessive governmental entanglement in violation of the Establishment Clause. *Johnson v. Sanders*, 319 F. Supp. 421 (D. Conn. 1970), affirmed 403 U.S. 955 (1971). The Court noted that the employees at these schools were hired, fired, disciplined and controlled by church officials. They worked in buildings which the church owned and which were paid for by the church with funds drawn from church accounts. Thus, all work was performed in the employ of the church. (See also, *Board of Education v. Allen*, 392 U.S. 236, 88 S.Ct. 1923 (1968)).

Any attempt by the state to become involved in the labor practices of the Catholic Church would likewise constitute excessive governmental entanglement. *Surinach v. Pesquera de Busquets*, 604 F.2d 73 (1st Cir. 1979), was an action for injunction brought by a Catholic Educational Association against the Puerto Rican Department of Consumer Protection. That Department had undertaken to investigate the costs of private schools. It issued

a discovery order to compel the Catholic school administrators to produce documentation of their accounts. The administrators refused to comply and sought to enjoin the Department's action as an impermissible entanglement of the affairs of church and state. The District Court dismissed the action for injunction; however, the Court of Appeals reversed, holding that the orders were unconstitutional as an encroachment on First Amendment rights and should be permanently enjoined. The Court cited *Lemon v. Kurtzman, supra,* wherein it was stated that the schools in question are an integral part of the Catholic Church and as such "involve substantial religious activity and purpose." The Court also recognized the potential for subsequent governmental involvement and control of the parochial schools should it permit the Department of Consumer Protection to proceed with discovery.

The United States Supreme Court has held that teachers in Church-operated schools are not within the coverage of the National Labor Relations Act, thus precluding NLRB jurisdiction over the church-run schools to require their recognition of teachers' unions. *NLRB v. The Catholic Bishop of Chicago,* 440 U.S. 490 (1979). The Court found it unnecessary to treat the constitutional issues arising under the religion clauses; rather, it focused its opinion on whether Congress *intended* the Board to have such jurisdiction. It held that teachers in church-operated schools which teach religious and secular subjects are not within the coverage of the National Labor Relations Act when there is no clearly express affirmative intention of Congress that such teachers fall within the coverage. The Court did recognize that the church-teacher relationship in a church-operated school differs from the employment relationship in a public or non-religious school and stated that, if the Act *did* confer jurisdiction over church-operated schools, there would be a significant risk of infringement on the religion clauses of the First Amendment. While there is no express exemption for churches from the provisions of the Connecticut Fair Employment

Practices Act, neither is there an express statement of intention that the Act pertain to churches. Clearly, such provision would render the Act unconstitutional on its face.

III. CONCLUSION

An administrative body must act strictly within its statutory authority, within constitutional limitations, and in a lawful manner. *City of Waterbury v. Commission on Human Rights and Opportunities*, 160 Conn. 226, 230, 278 A.2d 771 (1971), citing *Southern New England Telephone Co. v. Public Utilities Commission*, 144 Conn. 516, 523, 134 A.2d 351 (1957). In the instant case, the Commission on Human Rights and Opportunities proposes to exceed these dictates. Any application of the Connecticut Fair Employment Practices Act to a church is violative of the religion clauses of the First Amendment. It constitutes pervasive governmental intrusion into protected church activity. Parish schools strive to integrate the teaching of religious doctrine and moral values with secular education. The principle of separation between Church and State embodied in the First Amendment of the United States Constitution forbids the application of this statute to a church. To hold otherwise would constitute sanctioning of outside control or [sic] the hiring practices of churches, as excessive governmental entanglement with the internal affairs of churches.

The application of the Connecticut Fair Employment Practices Act to a church would constitute a particularly offensive surveillance of a church and, for these reasons, the defendant respectfully requests the Court to grant its Motion to Dismiss Plaintiff's Petition for Ordering Answers to Interrogatories.

DEFENDANT, ARCHDIOCESAN SCHOOL OFFICE,

BY _____

Maura Connelly Chasse for
Cooney, Scully and Dowling
266 Pearl Street
Hartford, Connecticut 06103
527-1141, Juris No. 10872

I hereby certify that a copy of the foregoing was mailed to all counsel of record on October 20, 1987.

_____

Maura Connelly Chasse

Supreme Court, U.S.
FILED
AUG 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-126

In The
Supreme Court Of The United States

OCTOBER TERM, 1987

ARCHDIOCESAN SCHOOL OFFICE, ET AL.,
Appellant

v.

COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES,
Appellee

ON APPEAL FROM THE SUPREME COURT OF CONNECTICUT

MOTION TO DISMISS OR AFFIRM

JOSEPH I. LIEBERMAN
Attorney General

ROBERT WHITEHEAD
Assistant Attorney General

ROBERT B. TEITELMAN
Assistant Attorney General

CARL J. SCHUMAN*
Assistant Attorney General
30 Trinity Street
Hartford, Connecticut 06106
Telephone: (203) 566-4990

**Counsel of Record For Appellee*

QUESTION PRESENTED

Whether the First Amendment's free exercise of religion clause requires the dismissal of a state civil rights commission petition to enforce interrogatories about possible discrimination by a church when the church retains the right to object to specific interrogatories on religious grounds?

ARGUMENT

THIS CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION

In this case the Connecticut Commission on Human Rights and Opportunities (CHRO) brought a statutory proceeding in Connecticut Superior Court to enforce interrogatories concerning possible employment discrimination by the appellant Archdiocesan School Office, which had previously failed to answer these interrogatories. Juris. Statement at A-3; Conn. Gen. Stat. § 46a-88; Juris. Statement at A-25. The Superior Court granted the appellant's motion to dismiss, a motion which, under Connecticut practice, normally tests only the adequacy of jurisdiction, venue, and process. *See* Appendix. On appeal the Connecticut Supreme Court made clear that "[t]he only issue before [it] at [the] time was whether the trial court should have dismissed the petition." Juris. Statement at A-8. The Court plainly reserved the possibility that the appellant "may have a cognizable religious reason as well as other grounds for objecting to some of the interrogatories that have been propounded." *Id.* (footnote omitted).

Such a holding does not raise a substantial federal question.[1] Freedom of religious conduct is not absolute, *Bowen v. Roy*, 106 S.Ct. 2147, 2152 (1986), and the minor burden, if any, imposed on the appellant in having to raise its freedom of religion arguments by way of objections to interrogatories rather than by way of a motion to dismiss is surely not one that violates the free exercise clause. *See Johnson v. Robison*, 415 U.S. 361, 383–86 (1974) ("incidental burden" on religious freedom of conscientious objectors by denial of veterans' educational benefits does not violate free exercise clause).

---

[1] The CHRO agrees that, apart from the issue of the substantiality of the federal question, this Court has jurisdiction in the strictest sense, since the Connecticut Supreme Court essentially held that the Connecticut statute authorizing a court to take jurisdiction over an interrogatory enforcement action was not unconstitutional. *See* 28 U.S.C. § 1257(2); Conn. Gen. Stat. § 46a-88; Juris. Statement at A-25.

Indeed, the holding here in reality is only a procedural one that fully and properly preserves the right of the appellant to raise its religious objections in a meaningful way. The appellant simply has not yet exercised that right and, at least until it does, no basis exists for further review of the case.

CONCLUSION

For the foregoing reasons, this Court should dismiss the appeal for want of a substantial federal question or, in the alternative, summarily affirm.

Respectfully submitted.

CONNECTICUT COMMISSION ON
HUMAN RIGHTS AND OPPORTUNITIES

Appellee

JOSEPH I. LIEBERMAN
Attorney General

ROBERT WHITEHEAD
Assistant Attorney General

ROBERT B. TEITELMAN
Assistant Attorney General

CARL J. SCHUMAN*
Assistant Attorney General
30 Trinity Street
Hartford, Connecticut 06106
Telephone: (203) 566-4990

John T. Gereski, Jr.
Law Student Intern

*Counsel of Record For Appellee

No. 87-126

In The
Supreme Court Of The United States

OCTOBER TERM, 1987

ARCHDIOCESAN SCHOOL OFFICE, ET AL.,
Appellant

v.

COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES,
Appellee

ON APPEAL FROM THE SUPREME COURT OF CONNECTICUT

APPENDIX

Motion to Dismiss — Grounds

The motion to dismiss shall be used to assert (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, and (5) insufficiency of service of process. This motion shall always be filed with a supporting memorandum of law, and where appropriate, with supporting affidavits as to facts not apparent on the record.

If an adverse party objects to this motion he shall, at least five days before the motion is to be considered on the short calendar, file and serve in accordance with Sec. 120 a memorandum of law and, where appropriate, supporting affidavits as to facts not apparent on the record. An adverse party who fails timely to file such a memorandum pursuant to this section shall be deemed by the court to have consented to the granting of the motion.